

ENVIRONMENTAL PROTECTION AGENCY

[AMS-FRL]

California State Motor Vehicle Pollution Control Standards;
Waiver of Federal Preemption - Notice of Within-the-Scope
Determination

AGENCY: Environmental Protection Agency (EPA)

ACTION: Notice Regarding Waiver of Federal Preemption-Within-
the-Scope Determination

SUMMARY: On March 26, 1999, EPA published a Notice of Opportunity for Public Hearing and Public Comment (*see 64 Federal Register 14715, March 26, 1999*), regarding California's request to EPA that EPA confirm the California Air Resources Board's (CARB's) finding that amendments to its zero-emission vehicle (ZEV) requirements of the low-emission vehicle (LEV) program are within-the-scope of a waiver of federal preemption EPA had previously approved (the earlier LEV waiver can be found at *58 Federal Register 4166, January 13, 1993*).

EPA is determining that California's amendments to the ZEV requirements of the LEV program, including the repeal of ZEV sales requirements from 1998 through 2002, are within the scope of previous waivers of Federal preemption granted pursuant to section 209(b) of the Clean Air Act (Act) to adopt and enforce its revised emission standards and accompanying enforcement procedures for 1988 and later model year vehicles and engines. In conjunction with the Notice of Opportunity for Public Hearing and Public Comment noted above, EPA held a hearing on the issues

discussed within today's determination, therefore no additional opportunity for hearing is offered.

ADDRESSES: At the EPA's Air and Radiation Docket and Information Center, there are copies of the decision document containing an analysis of CARB's within-the-scope waiver request including: information on standards and procedures and records of documents used in the decision document analysis (Docket A-97-20). The Air Docket Office is open from 8:00 to 5:30 p.m. Monday through Friday, room M-1500, Waterside Mall, 401 M Street, SW, Washington, D.C. 20460.

Electronic copies of this Notice and the accompanying Decision Document are available via the Internet on the Office of Transportation and Air Quality (OTAQ) website (<http://www.epa.gov/OMSWWW>). Users can find these documents by accessing the OTAQ website and looking at the path entitled, "Regulations." This service is free of charge, except for any cost you already incur for Internet connectivity. The electronic Federal Register version of the Notice is made available on the day of publication on the primary website (<http://www.epa.gov/docs/fedrgstr/EPA-AIR>).

Please note that due to differences between the software used to develop the documents and the software into which the documents may be downloaded, changes in format, page length, etc., may occur.

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SUPPLEMENTARY INFORMATION:

I. ZEV Amendments Within the Scope Request

A. Procedural History

On January 13, 1993, EPA published a Notice Regarding Waiver of Federal Preemption granting California a waiver of federal preemption for the California LEV program. (58 *Federal Register* 4166). The California LEV waiver included California's original ZEV requirements.

In March 1996, CARB amended the LEV program by eliminating the ZEV sales requirement for model years 1998 through 2002 along with several other modifications noted above.

On February 26, 1997, CARB submitted to the Administrator a request that EPA confirm the CARB Board's determination that the amendments to its regulations are within-the-scope of the existing LEV waiver. CARB also entered into, on March 29, 1996, memoranda of agreement (MOAs) with the seven largest vehicle manufacturers. These MOAs provide for the introduction of a certain number of ZEVs into the California market for calendar years 1998 through 2000 and require CARB to perform certain tasks.

When EPA receives new waiver requests from CARB, EPA publishes a notice of opportunity for public hearing and comment

and then publishes a decision in the Federal Register following the public comment period. In contrast, when EPA receives within-the-scope waiver requests from CARB, EPA traditionally publishes a decision in the Federal Register and concurrently invites public comment if an interested party is opposed to EPA's decision.

Because EPA had already received written comment on this within-the-scope request, EPA held a hearing and invited comment on several issues before issuing today's decision. (See 58 *Federal Register* 14715, 14716, March 26, 1999). The hearing was held on April 23, 1999. The public comment period closed on May 10, 1999.

Subsequent to the hearing and comment period, the United States Court of Appeals for the First Circuit issued a decision regarding the State of Massachusetts' adoption of California's MOAs as its own regulations, including a ruling on the question of whether the MOAs are federally preempted by section 209(a) of the Act. (See *Association of International Automobile Manufacturers, Inc. v. Commissioner, Massachusetts Department of Environmental Protection*, 208 F.3d 1 (1st Cir. 2000)).

B. Scope of Review

EPA may consider CARB's amendments or regulations to be within the scope of a previously granted waiver if the amendment does not undermine California's determination that its standards, in the aggregate, are as protective of public health and welfare as comparable Federal standards, does not affect the consistency

of California's requirements with section 202(a) of the Act, and does not raise new issues affecting EPA's previous waiver determination.

C. Decision

I have determined that California's ZEV amendments to its LEV regulations as applied in the 1994 model year and beyond are within the scope of previous waivers of Federal preemption granted pursuant to section 209(b) of the Act. The basis for this determination is described in detail in the Decision Document, which can be found in the docket for this action. The ZEV amendments to the LEV requirements which are applicable under California state law to 1998 through 2002 model year passenger cars, light-duty trucks, and medium-duty vehicles require manufacturers to provide the following:

- (1) the elimination of the requirement upon manufacturers to certify, produce, and offer for sale in California ZEVs in amounts equal to two percent of their total California sales of passenger cars and light-duty trucks weighing less than 3,750 pounds beginning with the 1998 model year, increasing to five percent in the 2001 model year and ten percent in the 2003 model year (the ten percent ZEV requirement for the 2003 model year has been retained by California);
- (2) the creation of multiple ZEV credits for vehicles produced prior to the 2003 model year; and
- (3) the creation of test procedures for determining All-Electric Vehicle Range.

In a February 26, 1997 letter to EPA, CARB notified EPA of the above-described ZEV amendments to its LEV regulations affecting 1988 and subsequent model year vehicles, and requested that EPA confirm that the ZEV amendments are within the scope of existing waivers of Federal preemption. The Executive Officer stated that "[t]he Board found that the amendments covered by this letter will not cause California motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable Federal standards...."¹

On January 7, 1993, EPA granted a waiver of Federal preemption for California's LEV program.² In doing so, EPA found that CARB's protectiveness determination was not arbitrary or capricious. As explained more fully in the Decision Document, EPA finds that CARB's protectiveness determination is not undermined by the ZEV amendments. Despite the elimination of the ZEV sales requirements from 1998 to 2002, CARB's NMOG fleet average standard remains the same and CARB's tiered LEV standards are at least as protective as comparable federal standards.

In addition, EPA finds that CARB's amendments do not affect their consistency with section 202(a) of the Act. The elimination of the ZEV sales requirement places no additional burden on the manufacturers; in fact, the manufacturers now have additional lead time to develop and implement ZEV technology.

¹ CARB letter at 5.

² 58 FR 4166 (January 13, 1993).

EPA also finds that the test procedure consistency requirement is not adversely affected by the CARB amendments as manufacturers of ZEVs are only required to test according to CARB's procedures. Finally, the ZEV amendments raise no new issues affecting EPA's previous waiver determination. Thus, these amendments are within-the-scope of the previous waiver granted on January 13, 1993.

II. Significance of MOAs

Within the initial *federal register* notice regarding CARB's request,³ EPA sought comment as to "the significance of the MOAs and issues that may arise out of the MOAs and their relevance to the within-the-scope waiver request CARB has submitted to EPA, addressing how the MOAs and related issues affect EPA's consideration either under the within-the-scope or waiver criteria."

As more fully explained in the Decision Document, EPA has determined that the existence of the MOAs does not affect the within-the-scope determination. EPA believes that it has the authority and discretion to examine the MOAs, and similar methodologies and realities in California, to determine whether they have any adverse impact on either the waiver or within-the-scope criteria. As noted in the Decision Document, no such adverse impact was found in today's determination.

My decision will affect not only persons in California but also the manufacturers outside the State who must comply with

³ 64 FR 14715, 14716 (March 26, 1999)

California's requirements in order to produce motor vehicles for sale in California. For this reason, I hereby determine and find that this is a final action of national applicability.

As with past waiver decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. sec. 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Finally, the Administrator has delegated the authority to make determinations regarding waivers of Federal preemption under section 209(b) of the Act to the Assistant Administrator for Air and Radiation.

Dated:_____

Robert Perciasepe
Assistant Administrator
for Air and Radiation

cc: Gregory Green

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